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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. VICTOR HERNANDEZ et al., Defendants and Appellants.	B202401 (Los Angeles County Super. Ct. No. KA071860)

APPEALS from a judgment of the Superior Court of Los Angeles County, Robert M. Martinez, Judge. Affirmed in part, reversed in part and remanded with directions.

Patricia A. Scott, under appointment by the Court of Appeal, for Defendant and Appellant Victor Hernandez.

Waldemar D. Halka, under appointment by the Court of Appeal, for Defendant and Appellant Larry Hernandez.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Victoria B. Wilson and Mary Sanchez, Deputy Attorneys General, for Plaintiff and Respondent.

SUMMARY

Appellants Victor Hernandez and Larry Hernandez were convicted in a jury trial of first degree murder of Gregory Acuna.[1] The jury further found allegations pursuant to Penal Code sections 12022.5, subdivision (a), 1203.06, subdivision (a)(1), 12022, subdivision (a)(1) and 186.22, subdivision (b)(1)(A) true as to appellant Victor Hernandez.[2] The jury also found allegations pursuant to sections 12022, subdivision (a)(1) and 186.22, subdivision (b)(1)(A) true as to appellant Larry Hernandez. In a bifurcated proceeding, the trial court found true the special circumstance allegation that Larry Hernandez had sustained a prior conviction of first degree murder within the meaning of section 190.2, subdivision (a)(2).

Appellant Larry Hernandez was sentenced to a term of life in prison without the possibility of parole, plus one year. Appellant Victor Hernandez was sentenced to a term of 38 years to life.

Appellants contend their convictions must be reversed because the trial court erred in failing to instruct on accomplice testimony and because there was insufficient evidence presented to corroborate the testimony of accomplices. They further contend that there was insufficient evidence to support the gang allegation pursuant to section 186.22, subdivision (b)(1)(A). Both appellants also contend that they were denied effective assistance of counsel. Appellant Larry Hernandez also argues that the trial court committed instructional error and failed to properly respond to a jury question on the issue of aider and abettor liability for first degree murder. Appellant Victor Hernandez also contends that a three-year enhancement for the section 186.22, subdivision (b)(1)(A) was not authorized and should be stricken.

We find that all of Larry Hernandez's claims lack merit with the exception of his contention that the trial court erred in its response to the jury question relating to aider

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[1] Their first trial, in May 2007, ended in a hung jury as to appellants. A codefendant in that trial, Robert Ramirez, was acquitted.

[2] All further statutory references are to the Penal Code unless otherwise stated.

and abettor liability. We conclude that error requires reversal or reduction of his first degree murder conviction to second degree murder. As to appellant Victor Hernandez, we find that all of his claims lack merit with the exception of the claim that the trial court erred in imposing a three-year enhancement to his sentence. We modify his sentence and otherwise affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Appellants[3] were members of the Lomas Street gang. The Lomas gang claimed the Rosemead area as its territory. A rival gang, Sangra, claimed San Gabriel as its territory. Neither gang claimed the City of West Covina.

Alejandro Valadez was the primary witness for the People. Valadez testified that he knew both appellants. He had met them through childhood friends Marcus Gallardo and Paul Garcia, also members of Lomas. Gallardo is the brother of Monique Gallardo, with whom Valadez had a child. Valadez testified that, although he was not a member, he had several friends who were members of the Lomas gang.[4] Valadez was living with Monique and their infant child at her mother's house at Vincent and El Dorado in West Covina in December 1994. He had been living there for two years. Marcus Gallardo also lived at the house.

A group of Lomas gang members gathered at the West Covina house to celebrate the New Year on December 31, 1994. Those present included appellant Larry Hernandez, appellant Victor Hernandez, Marcus Gallardo, Danny Hernandez, Paul Garcia, Jose Menchaca, Robert Ramirez and Brent Avila. Valadez came home from work and joined the group. Sometime before that day he had learned from Lomas gang members that a Sangra gang member was living in the neighborhood.

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[3] Although both have the same last name, appellants Larry and Victor Hernandez are not related. It is only for the sake of simplicity that they will be referred to by their first names hereafter.

[4] His testimony was impeached on the issue of gang membership by evidence of prior police contacts in which he had been identified by the police as a member of the Lomas gang.

Valadez testified that he happened to look out the window that night and saw a young man walking on the sidewalk in front of the house. The young man was wearing baggy pants, baggy shirt, and a black jacket. Although Valadez had not seen him before, he assumed that the young man was the Sangra gang member who had been reported to be living in the neighborhood. That young man was Gregory Acuna.[5]

Valadez yelled out to the others. He testified: "I yelled out that assuming there was a guy from Sangra." He expected that they were going to "go up to him, jump him maybe." By "jump" he meant to "beat him up." Valadez did not intend to personally confront the man, and he testified that it was a stupid mistake to yell out to the others. He acknowledges that he "provoked" the incident that followed.

Valadez testified that Larry and Victor Hernandez and another man ran out and confronted Acuna, saying: "Where are you from?", a question asking what gang did he belong to. Valadez walked out of the house onto the grass in front, holding his baby in his arms. Acuna was trying to walk away with the three following him. Appellant Larry tried to pull Acuna's jacket off. Appellant Victor took a swing at Acuna as Acuna tried to get away, and Victor then pulled out a gun and started shooting at him. Acuna started running across the street with Victor firing at him. Valadez heard a total of four or five shots. Everyone except Valadez and Marcus Gallardo then left in the same car.

Valadez denied knowing anything about the murder when interviewed by the police that night.

Valadez moved out of the house sometime after the shooting. He was arrested for robbery in mid-1995. He provided information to the police about another murder committed by Danny Hernandez, who had given Valadez a gun to hide. Valadez had eventually given that gun to his brother, who discarded it in a lake. Valadez was promised a state prison sentence of five years for his robbery conviction in consideration for his cooperation in that case. Before his sentencing hearing on that case, he attempted

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[5] As it turns out, Acuna was not a member of Sangra. He was a member of the Alwood gang. Whether this fact would have altered his fate is unknown.

to obtain more leniency by trying to tell police about the Acuna murder. Valadez's attempt failed. When detectives went to interview him at the courthouse before his sentencing, Valadez refused to speak to them without his lawyer, who was not present. He was sentenced to five years for the robbery.

He testified that upon release from prison, he had no further contact with Lomas gang members and lived a crime-free life. The police contacted Valadez again in 2002. He was interviewed several times in 2002 and 2003 and provided the police with the information contained in his trial testimony. He testified that he had not been offered and had not received anything in exchange for his testimony.

Jose Menchaca testified for the prosecution. He was an uncooperative witness who had been convicted of manslaughter, a crime he committed with the same gun used in the killing of Gregory Acuna. The facts of the manslaughter conviction were not brought out in the trial of appellants with the exception of the fact that crime occurred in Rosemead on December 29, 1994, two days before the killing of Acuna, and that Brent Avila was also charged in that crime and was convicted of attempted murder.[6]

Menchaca testified that he was a member of the Lomas gang in 1994-1995, and that appellants Victor and Larry Hernandez, who he had known since childhood, were also members. He also testified that Valadez was not a member but did hang out with

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[6] Menchaca was sentenced to a term of ten years, which included a term for use of a firearm, and Avila was sentenced to a term of seven years. In a hearing out of the presence of the jury, the People made an offer of proof regarding the Rosemead homicide. The proffer did not include the details of that crime because the prosecutor told the court that he did not recall the details. The proffer included the fact that Menchaca had told police Detective Wheeless that he had gone to Rosemead to buy marijuana with appellant Victor Hernandez, Robert Ramirez, Marcus Gallardo and Brent Avila, and that after the shooting in Rosemead, they all went to the West Covina house where they stayed for the next day and a half. Menchaca never said who had the gun. Appellant Larry Hernandez showed up at the residence sometime after the others arrived. Both appellants objected to evidence that anyone other than Brent Avila went with Menchaca to Rosemead or drove from Rosemead to the West Covina house. The trial court sustained their objections.

members of Lomas. He testified that Sangra was a rival gang and that neither gang claimed West Covina as their territory. He testified that it is not unheard of for gang members to share guns.

He denied making statements to Police Detective Steven Wheeless in which he described the events of the night of the shooting. His testimony was then impeached by Detective Wheeless, who testified about his interview with Menchaca at a state prison facility in 2003. Detective Wheeless testified that he began the interview by telling Menchaca that he did not believe that Menchaca was a suspect in the Acuna murder. Detective Wheeless testified that he said this because he already had information from Valadez, who had identified three others as being involved in the shooting.

Detective Wheeless also testified that Menchaca stated that he went from the scene of the shooting in Rosemead on December 30 to the West Covina house and stayed there for a day and a half. Menchaca also told Detective Wheeless that everyone in the house knew that a Sangra gang member lived around the corner.

Wheeless testified that Menchaca stated that he was at the New Year's Eve party and he identified the others who were present: Larry Hernandez, Victor Hernandez, Robert Ramirez, Alejandro Valadez, Monique Gallardo, Marcus Gallardo, and Brent Avila. Menchaca told Detective Wheeless that at one point that night, three of them ran out of the house, he heard gunshots and the three people drove off in Robert Ramirez's car. Menchaca played a little cat-and-mouse with Detective Wheeless when he was asked who the three were who ran out. Detective Wheeless asked if Victor and Larry Hernandez and Robert Ramirez were the ones who ran out. Menchaca smiled and said that he could not say. Detective Wheeless then went through the names, one at a time, of the others Menchaca had said were at the party — as to each Menchaca said that person was not one of the three who ran out. Having gone through all of the names except for Victor and Larry Hernandez and Ramirez, Detective Wheeless again asked if the Hernandezes and Ramirez were the three, and Menchaca would only smile and say he couldn't say.

No evidence was introduced as to how the gun used in the Rosemead shooting got to the West Covina residence the night of the Acuna murder or how it came to be in the possession of the person who shot and killed Acuna. No evidence was introduced that the gun was ever recovered.

Raul Rodriguez resided with his family near the intersection of Vincent Avenue and El Dorado streets in West Covina on the early morning of January 1, 1995. He heard five or six gunshots coming from the area of Vincent and looked outside. Upon being interviewed that night, he told the police that he saw three males running away from the area where Acuna's body was later found.[7] He did not realize at the time that someone had been shot. He thought the three males had probably fired a gun in the air to celebrate the New Year. The three males were probably Hispanic and were wearing white tee shirts. He saw the men running toward a car parked on Vincent, and the car drove off. He did not see whether the males got into the car.

Officer Jim Larue testified that he was the first officer to respond to the scene. He observed the body of Gregory Acuna lying in the gutter on Vincent Avenue in West Covina. He observed expended shell casings and an expended bullet near the body, and he secured the area until investigators arrived. Officer Larue also testified about his interview of Raul Rodriguez.

Later crime scene investigation and the autopsy determined that Acuna had been shot six times, resulting in his death. Expended casings and projectiles were recovered at the scene. Four projectiles were also recovered from Acuna's body at autopsy. All were fired from the same .380 semiautomatic pistol.[8]

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[7] His initial statement to the police was presented to the jury through the former testimony of Officer Larue. His trial testimony differed from his statement to Officer Larue. He testified that he saw a young man walking and getting into a car, and four or five young males yelling and running. He then heard gunshots.

[8] One .38 special casing was recovered 40-50 feet from Acuna's body, and one .38 special expended projectile was recovered 80-100 feet from his body. It was stipulated that neither of these could have been fired from the .380 semiautomatic pistol used to kill

Lt. Dan Rosenberg testified as an expert on gang activity. He testified that street gangs have four basic rules: "The first is silence, that you don't cooperate with authorities, you don't cooperate with the police, you don't cooperate with school officials. [¶] The second is rivalry. Gangs are adversarial by nature. Each gang wants to be known, again, as the toughest, most revered gang around. They don't get along with each other, although some do but most of them don't. [¶] Revenge, any insult, whether real or imaginary, will be avenged. It doesn't matter how long it takes. It will be avenged. [¶] And cohesiveness. Gang members are expected to look after each other, take care of each other, and stay close together."

Presented with a hypothetical tracking the facts as described by Valadez, Lt. Rosenberg was asked if the shooting of Acuna benefited Lomas. He answered: "The individual shooter who pulled the trigger is going to be raised, their stature is going to be raised in the gang because he killed a rival gang member. The remaining individuals who are there are also going to be raised up in stature because they have raised the level of the gang in this particular case, the Lomas gang, which will make them even more revered by their rivals." He further testified: "Based on my specific knowledge of the Lomas gang, the members of that gang, including one of the defendants in this case, I know for a fact that they acted in concert."

Lt. Rosenberg also testified that Lomas and Sangra were rival gangs that "did not get along. Most criminal street gangs want to be considered the toughest, most revered gang around, and when they would meet up with another gang and they did not get along, such as Lomas and Sangra, there would be a violent confrontation. [¶] . . . [¶] . . . When both gangs would meet, there'd be some type of assault. They were all felony assaults ranging from attempted murder to murder." He also testified that a confrontation in which one gang member asks a member of a rival gang "Where are you from," is a direct challenge to fight and that homicides are a common occurrence in such confrontations.

Acuna, and no evidence was introduced as to what, if any, connection these items had to the killing of Acuna.

DISCUSSION

1. *The Trial Court's Failure to Instruct on Accomplice Testimony Was Harmless Error*

Although they did not request such instructions in the trial court, both appellants argue that the trial court erred by failing to instruct on accomplice testimony requiring reversal of their convictions. They contend that both Valadez and Menchaca were accomplices as a matter of law.[9]

Section 1111 provides: "A conviction [cannot] be had upon the testimony of an accomplice unless it be corroborated by such other evidence as shall tend to connect the defendant with the commission of the offense; and the corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof. [¶] An accomplice is hereby defined as one who is liable to prosecution for the identical offense charged against the defendant on trial in the cause in which the testimony of the accomplice is given."

Section 31 provides that liability for the commission of a crime may be the result of directly committing the act constituting the offense or by aiding and abetting its commission. Appellants contend that Valadez was an accomplice because he aided and abetted in the assault and the resulting homicide. They rely upon Valadez's testimony that when he yelled out to the Lomas gang members present in the house that night, he anticipated that they would confront and fight with Acuna, and that he believed that he had been stupid and that he had provoked the incident. Aiding and abetting requires more, however. To aid and abet, one must know that the perpetrator intended to commit the crime and, before or during its commission, one must intend to aid and abet the commission. "[T]he aider and abettor must share the specific intent of the perpetrator. By 'share' we mean neither that the aider and abettor must be prepared to commit the offense by his or her own act should the perpetrator fail to do so, nor that the aider and

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[9] Prior to sentencing, counsel for each appellant argued motions for new trial based upon the failure to instruct on accomplice testimony as to Valadez. Neither raised the issue as to Menchaca. The motions for new trial were denied, the trial court concluding that there had been insufficient evidence to support accomplice instructions.

abettor must seek to share the fruits of the crime. [Citation.] Rather, an aider and abettor will 'share' the perpetrator's specific intent when he or she knows the full extent of the perpetrator's criminal purpose and gives aid or encouragement with the intent or purpose of facilitating the perpetrator's commission of the crime. [Citations.] The liability of an aider and abettor extends also to the natural and reasonable consequences of the acts he knowingly and intentionally aids and encourages. [Citation.]" (*People v. Beeman* (1984) 35 Cal.3d 547, 560.)

It cannot be said as a matter of law that Valadez's conduct constituted aiding and abetting, i.e., that Valadez, by alerting the others to Acuna's presence, intended to precipitate the assault on Acuna. Whether his expectation and knowledge constituted the requisite specific intent was a question of fact for the jury to determine and an instruction on that issue should have been given. (*People v. Zapien* (1993) 4 Cal.4th 929, 982.) The appropriate instruction to address the accomplice issue regarding Valadez was CALCRIM No. 334, and it was error not to give it.[10]

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[10] CALCRIM No. 334 provides:

"Before you may consider the (statement/ [or] testimony) of _____ as evidence against [the defendant regarding the crime of _____], you must decide whether _____) [was an accomplice to that crime]. A person is an *accomplice* if he or she is subject to prosecution for the identical crime charged against the defendant. Someone is subject to prosecution if he or she personally committed the crime or if:

"1. He or she knew of the criminal purpose of the person who committed the crime;

"AND

"2. He or she intended to, and did in fact, (aid, facilitate, promote, encourage, or instigate the commission of the crime[;]/ [or] participate in a criminal conspiracy to commit the crime).

"The burden is on the defendant to prove that it is more likely than not that _____ [was an accomplice].

"[An accomplice does not need to be present when the crime is committed. On the other hand, a person is not an accomplice just because he or she is present at the scene of a crime, even if he or she knows that a crime will be committed or is being committed and does nothing to stop it.] [¶] . . . [¶]

"[A person may be an accomplice even if he or she is not actually prosecuted for the crime.] [¶] . . . [¶]

We reject appellants' argument, however, that Menchaca was an accomplice. That he used the same gun one and one-half days before in another crime and he was a member of Lomas are not sufficient to show that he provided the gun to the perpetrators of the murder of Acuna, or, if he did, that he had the requisite specific intent.

Appellants contend that failure to instruct on accomplice testimony resulted in the jury not being properly admonished to view the testimony of Valadez and Menchaca with caution. This argument fails as to Menchaca since we have concluded he was not an accomplice. As to Valadez, appellants correctly observe that CALCRIM No. 226 instructs the jury to judge each witness by the same standard. That instruction, however, goes on to state that the jury may "consider anything that reasonably tends to prove or disprove the truth or accuracy of" the testimony, including any personal interest the

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"If you decide that a [witness] was not an accomplice, then supporting evidence is not required and you should evaluate his or her (statement/ [or] testimony) as you would that of any other witness.

"If you decide that a (declarant/ [or] witness) was an accomplice, then you may not convict the defendant of _____ based on his or her [testimony] alone. You may use the [testimony] of an accomplice to convict the defendant only if:

"1. The accomplice's (statement/ [or] testimony) is supported by other evidence that you believe;

"2. That supporting evidence is independent of the accomplice's (statement/ [or] testimony);

"AND

"3. That supporting evidence tends to connect the defendant to the commission of the crime.

"Supporting evidence, however, may be slight. It does not need to be enough, by itself, to prove that the defendant is guilty of the charged [crime], and it does not need to support every fact (mentioned by the accomplice in the statement/ [or] about which the accomplice testified). On the other hand, it is not enough if the supporting evidence merely shows that a crime was committed or the circumstances of its commission. The supporting evidence must tend to connect the defendant to the commission of the crime.

"[The evidence needed to support the (statement/ [or] testimony) of one accomplice cannot be provided by the (statement/ [or] testimony) of another accomplice.]

"Any (statement/ [or] testimony) of an accomplice that tends to incriminate the defendant should be viewed with caution. You may not, however, arbitrarily disregard it. You should give that (statement/ [or] testimony) the weight you think it deserves after examining it with care and caution and in the light of all the other evidence."

witness might have, whether the witness made any inconsistent statements, whether the witness's testimony was reasonable, whether the witness admitted untruthfulness, and whether the witness had been convicted of a felony. The jury was also told: "If you decide that a witness deliberately lied about something significant . . . , you should consider not believing anything that witness says. Or, if you think the witness lied about some things, but told the truth about others, you may simply accept the part that you think is true and ignore the rest." Although the jury was not instructed to view Valadez's testimony with caution, it was otherwise properly instructed in the evaluation of witnesses, and those instructions combined with the final arguments of their trial counsel provided adequate guidance in evaluating Valadez's testimony had the jury determined that he was an accomplice. (*People v. Lewis* (2001) 26 Cal.4th 334, 370-371.) "Notwithstanding defendant's citation of federal and state Court of Appeal cases, we have observed that '[n]o cases have held failure to instruct on the law of accomplices to be reversible error per se.' (*People v. Gordon* (1973) 10 Cal.3d 460, 470)." (*People v. Lewis*, *supra*, 26 Cal.4th at p. 371.)

An examination of the entire record satisfies us that the failure to instruct on accomplice testimony was not prejudicial. It is not reasonably probable that appellants would have obtained a more favorable outcome had the instruction been given. (*People v. Watson* (1956) 46 Cal.2d 818, 836.) "Because we find no error and otherwise find any error to be harmless, we accordingly reject defendant's federal constitutional claims that the court's failure to instruct on accomplice liability violated his right to a trial by jury, to due process, and to present a defense protected by the Sixth and Fourteenth Amendments. . . ." (*People v. Lewis*, *supra*, 26 Cal.4th at p. 371.)

2. *There Was Sufficient Corroboration*

There was sufficient evidence to corroborate Valadez's testimony implicating appellants, satisfying the requirements of section 1111. "The requisite corroboration may be established entirely by circumstantial evidence. [Citations.] '["]Such evidence may be slight and entitled to little consideration when standing alone." [Citations.]'" (*People v. Miranda* (1987) 44 Cal.3d 57, 100.) "'Corroborating evidence "must tend to implicate

the defendant and therefore must relate to some act or fact which is an element of the crime but it is not necessary that the corroborative evidence be sufficient in itself to establish every element of the offense charged." [Citation.]' (*People v. Sully* (1991) 53 Cal.3d 1195, 1228.)" (*People v. Zapien*, *supra*, 4 Cal.4th at p. 982.)

The testimony of Jose Menchaca, in conjunction with the physical evidence at the crime scene and the testimony of Raul Rodriguez, provided the necessary corroboration. Menchaca's statement to Detective Wheeless indirectly identified appellants as two of the three who exited the house before shots were fired. Rodriguez told the police that he heard shots and then saw three males, probably Hispanic, running away from the area where Acuna's body was later found. He saw the men running toward a car parked on Vincent, and the car drove off. Acuna's bullet-riddled body was found in the area where Rodriguez had seen the three males. This evidence, without reference to Valadez's testimony, tends to connect the appellants with the crime charged and was sufficient to implicate appellants in the assault and murder of Acuna. Appellant's reliance on *People v. Falconer* (1988) 201 Cal.App.3d 1540, 1543 is misplaced because the evidence here did not require interpretation or direction from the accomplice's testimony to give it value.

3. *The Trial Court's Instruction on Aiding and Abetting Was Proper But the Trial Court's Response to the Jury Question Was Error*

Appellant Larry contends that the trial court erred in its instructions on aiding and abetting and in its response to a question the jury asked during deliberations about whether the two defendants could be convicted of different degrees of murder.

The trial court instructed using CALCRIM No. 400 (Aiding and Abetting: General Principles), CALCRIM No. 401 (Aiding and Abetting: Intended Crimes), CALCRIM No. 403 (Natural and Probable Consequences (Only Non-Target Crimes Charged)).

The trial court read the following CALCRIM No. 400:

"A person may be guilty of a crime in two ways. One, he or she may have directly committed the crime. Two, he or she may have aided and abetted someone else, who

committed the crime. In these instructions, I will call that other person the 'perpetrator.' A person is equally guilty of the crime whether he or she committed it personally or aided and abetted the perpetrator who committed it.

"Under some specific circumstances, if the evidence establishes aiding and abetting of one crime, a person may also be found guilty of other crimes that occurred during the commission of the first crime."

The trial court read the following CALCRIM No. 403:

"Before you may decide whether a defendant is guilty of murder upon the theory that he was an aider and abettor, you must decide whether he is guilty of a criminal assault.

"To prove that the defendant is guilty of murder, the People must prove that:

"1. The defendant is guilty of committing an assault;

"2. During the commission of the assault, the crime of murder was committed;

"AND

"3. Under all of the circumstances, a reasonable person in the defendant's position would have known that the commission of the murder was a natural and probable consequence of the commission of the assault.

"A natural and probable consequence is one that a reasonable person would know is likely to happen if nothing unusual intervenes. In deciding whether a consequence is natural and probable, consider all of the circumstances established by the evidence. If the murder was committed for a reason independent of the common plan to commit the assault, then the commission of murder was not a natural and probable consequence of the assault.

"To decide whether crime of murder was committed, please refer to the separate instructions that I have given you on that crime."

The trial court defined simple assault as the nontarget crime.[11]

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[11] Appellant Larry does not contend that it was error to instruct on the natural and probable consequence theory of aiding and abetting the target crime of simple assault.

In his argument to the jury, the prosecutor argued that although it was possible that the jury could determine that Larry directly aided and abetted in the murder, the most reasonable interpretation of the facts was that Larry did not necessarily have an intent to kill when he and the others assaulted Acuna, but the killing was the natural and probable consequence of that assault in the context of gang rivalries and gang culture as described in the testimony of Lt. Rosenberg. The prosecutor argued: "You need to decide whether under all the circumstances, the circumstances of this assault, when they think it's a rival gang member, all those circumstances, was it reasonable for a person in Larry Hernandez's position to know that murder was a natural and probable consequence of engaging in that assault."

Appellant Larry contends that CALCRIM No. 400 and CALCRIM No. 403 misstate the applicable law in a prosecution for the nontarget offense based upon the natural and probable consequences doctrine.

Appellant Larry contends that CALCRIM No. 403 incorrectly defines the term "natural and probable consequence." He argues that the proper test is whether the nontarget crime was "substantially certain to result." He finds support for his definition in *Gomez v. Acquistapace* (1996) 50 Cal.App.4th 740, 746-747, a case that addressed the requisite intent for the tort of intentional spoliation of evidence. He argues that the criminal intent required for murder should be no less than that required for an intentional tort. Since the *Gomez* court did not address nor in any way consider the natural and probable consequence doctrine, we find no basis to apply its reasoning here. We also note that no other court has done so. As stated in *People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 106-107: "Elaborating on the natural and probable consequences doctrine, in *People v. Prettyman* (1996) 14 Cal.4th 248, 261, and *People v. Croy* (1985) 41 Cal.3d 1, 12, footnote 5, we observed that an aider and abettor 'is guilty not only of the offense

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Indeed, he relies upon this theory in arguing that Valadez was an accomplice. Further, his counsel, at oral argument, conceded that, under circumstances of this case, deadly violence was a foreseeable consequence of the confrontation.

he intended to facilitate or encourage, but also of any reasonably foreseeable offense committed by the person he aids and abets.' As the Court of Appeal in *People v. Brigham* (1989) 216 Cal.App.3d 1039 noted, although variations in phrasing are found in decisions addressing the doctrine — 'probable and natural,' 'natural and reasonable,' and 'reasonably foreseeable' — the ultimate factual question is one of foreseeability. [Citations.] 'A natural and probable consequence is a foreseeable consequence' [citations]; the concepts are equivalent in both legal and common usage." CALCRIM No. 403 adequately defines the natural and probable consequence doctrine and provides proper guidance to the jury. The trial court did not err in giving it.

Appellant Larry also finds fault with the portion of CALCRIM No. 400 that states: "A person is equally guilty of the crime whether he or she committed it personally or aided and abetted the perpetrator who committed it." He contends that the trial court compounded the problem by telling the jury that Larry could not be convicted of a lesser degree of murder than Victor.

The jury began deliberations late in the afternoon of Friday, September 7, 2007 and resumed on Monday, September 10. At 9:51 a.m. on September 10, the jury sent a note to the trial court asking for the testimony of Raul Rodriguez and Officer Larue, and asked this question: "Can each defendant have defendant (*sic*) degrees of murder." The trial court responded to this question in open court, stating: "The liability of an aider and abettor is derivative; that is, it derives from what the perpetrator is responsible for. [¶] So, for example, if the perpetrator commits a second degree murder, the aider and abettor under the natural and probable consequences could not be convicted of first degree murder because, again, his responsibility is derived from the actual perpetrator. So they have to be the same. [¶] . . . [¶] [T]he aider and abettor could never be guilty of a greater crime than the actual perpetrator because it's derivative; that they would be the same. But, again, I'll redirect you to [CALCRIM No.] 403. I paraphrased but that instruction should guide you. . . ." The foreperson then asked: "Can the aider and abettor be subject to a lesser crime?" The court conferred with counsel and then answered: "I'll direct you to [CALCRIM No.] 403. And to answer your question, the culpablility of an aider and

abettor would be the same under any circumstance."[12] The reporter then read back the requested testimony, finishing at 11:20 a.m. and the jury resumed deliberations. The jury signaled it had reached verdicts at 11:34 a.m.

In support of his argument that the trial court erred, appellant Larry primarily relies upon the Supreme Court ruling in *People v. McCoy* (2001) 25 Cal.4th 1111 and the Third District opinion in *People v. Woods* (1992) 8 Cal.App.4th 1570. In *McCoy*, the Supreme Court addressed the issue of liability for homicide in the factual context of aiding and abetting in the commission of the target crime. The facts involved a street gang drive-by shooting in which both defendants, McCoy and Lakey, fired at the victims, McCoy firing the fatal shots. Both were found guilty of first degree murder. The Supreme Court concluded that McCoy could assert a defense of imperfect self-defense that was unavailable to Lakey, who did not share McCoy's state of mind. Because of their different mental states, the court concluded that Lakey could be convicted of a greater degree of homicide than McCoy. The court went on to state: "Nothing we say in this opinion necessarily applies to an aider and abettor's guilt of an unintended crime under the natural and probable consequences doctrine." (*People v. McCoy*, *supra*, 25 Cal.4th at p. 1117.)

The court in *People v. Woods*, *supra*, 8 Cal.App.4th 1570 dealt with a murder conviction based upon the natural and probable consequences doctrine. The facts in that case were that Woods and Windham, along with several others, sought to avenge the shooting of a friend by a rival gang. Armed with firearms and wearing masks, they went to an apartment, shot one occupant and assaulted others in the apartment in an effort to obtain information about the whereabouts of their prey. Windham waited outside as a

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[12] With the agreement of Larry, counsel for Victor was standing in for Larry's trial counsel, who was in another court. That stand-in-attorney agreed with the trial court's response, saying: "I hate to be arguing against [Larry] here because that's where the thrust of the question seems to be going; but legally, if it is a vicarious liability theory then he would have to be guilty of whatever the principal is." The prosecutor did not verbalize his position.

lookout. They all then left, taking some tires that belonged to the apartment occupants. Outside, as they were putting the tires in their car, they were observed by two bystanders. Woods fired at them, killing one. The group then fled to a friend's house, where Woods disposed of the gun and he and Windham flushed bullets down the toilet. The trial court instructed on both first and second degree murder. During deliberations, the jury asked a question similar to that asked by the jury here: "'Can a defendant be found guilty of aiding and abetting a murder in the second degree if the actual perpetrator of the same murder is determined to be guilty of murder in the first degree?'" The trial court answered: "'No.'" Both Woods and Windham were convicted of first degree murder of the bystander. (*Id.* at p. 1579.)

The *Woods* court reversed Windham's conviction of first degree murder, concluding that there was a question of fact whether first or second degree murder of the bystander were reasonably foreseeable consequence of the assaults in the apartment with which Windham aided and abetted, and the jury should have been informed that it could find Windham guilty of second degree murder even if it were to find Woods, the shooter, guilty of first degree. (*People v. Woods, supra,* 8 Cal.App.4th at p. 1578.) The *Woods* court also concluded that there was no evidence to support any homicide less than second degree murder. In reversing Windham's conviction of the first degree murder, the *Woods* court quoted *People v. Kelly* (1992) 1 Cal.4th 495, 528: "'When a greater offense must be reversed, but a lesser included offense could be affirmed, we give the prosecutor the option of retrying the greater offense, or accepting a reduction to the lesser offense.'" (*People v. Woods, supra,* 8 Cal.App.4th at p. 1596.)

The jury here was instructed on first and second degree murder, and there was ample evidence to support a verdict of either. The evidence could support a finding that appellant Larry shared Victor's premeditated intent to kill or that such a killing was a reasonably foreseeable consequence of the assault on Acuna. Likewise, the evidence here could support a finding that the reasonably foreseeable result of the assault on Acuna was an unpremeditated murder, even though Victor's mental state was adjudged sufficient to support a guilty verdict of first degree murder. We conclude that the trial

court therefore erred in its response to the jury's question whether the aider and abettor could be subject to a lesser crime than the perpetrator. Since the jury was foreclosed from finding him guilty of second degree murder, we find the error prejudicial requiring reversal of Larry's conviction for first degree murder. "There is a reasonable probability of a more favorable result within the meaning of *Watson* when there exists 'at least such an equal balance of reasonable probabilities as to leave the court in serious doubt as to whether the error affected the result.' (*People v.Watson*, *supra*, 46 Cal. 2d at p. 837.)" (*People v. Mower* (2002) 28 Cal.4th 457, 484.)

Larry contends that the jury should also have been instructed on manslaughter and failure to so instruct requires reversal as well. We disagree. There is no evidence of heat of passion or imperfect self-defense to justify instructions on voluntary or involuntary manslaughter. Since there was ample evidence to support conviction of either first or second degree murder, however, we will give the People the option of retrial or acceptance of a reduction to second degree murder.

4. *Ineffective Assistance of Counsel*

Both appellants claim that their convictions should be reversed because their trial counsel were ineffective. Both assert this claim based upon the failure of their counsel to request instructions on accomplice testimony as to witnesses Valadez and Menchaca. We have previously discussed that Menchaca was not an accomplice and his testimony was not subject to such an instruction. We have further concluded that, although the issue of whether Valadez was an accomplice was a question of fact for the jury to determine, failure to instruct on that issue was harmless error. Trial counsels' failure to request such an instruction was likewise harmless. Appellant Larry also asserts that his counsel was ineffective when the question from the jury was answered by the trial court. We have concluded that the trial court erred in its answer to the jury question. Whether the stand-in counsel provided ineffective assistance is immaterial since we have found prejudicial error and have reversed the first degree murder conviction.

5. *Gang Allegation*

Both appellants contend that there was insufficient evidence to support the jury's finding that the crimes for which they were convicted were committed "for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members" pursuant to section 186.22, subdivision (b)(1). Appellants contend that there was insufficient evidence to support a finding that they had the specific intent to promote gang activity. In this regard they make two arguments. First, they contend that the specific intent requirement is governed by the holding in *Garcia v. Carey* (9th Cir. 2005) 395 F.3d 1099, 1103 which interpreted that section to require a finding that the gang conduct promoted by the gang member must be separate from the facts of the underlying conviction. This interpretation is at odds with the plain language of the statute and with the analysis by other California courts that have considered it. We reject it as well.[13] "By its plain language, the statute requires a showing of specific intent to promote, further, or assist in '*any* criminal conduct by gang members,' rather than *other* criminal conduct." (*People v. Romero* (2006) 140 Cal.App.4th 15, 19, italics in original.)

Secondly, appellants also contend that the evidence is insufficient to support the finding that they had the specific intent to promote gang activity in committing the crimes for which they were convicted. We reject this argument as well. The basic principles governing judicial review of a sufficiency of the evidence challenge requires the court to "review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence -- that is, evidence which is reasonable, credible, and of solid value -- such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." (*People v. Johnson* (1980) 26 Cal.3d 557, 578.)

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[13] Federal court interpretation of state law is not binding. (*People v. Burnett* (2003) 110 Cal.App.4th 868, 882; *Oxborrow v. Eikenberry* (9th Cir. 1989) 877 F.2d 1395, 1399.)

Here, appellants approached Acuna, who they believed was a rival gang member, and asked "where are you from," grabbed him and attempted to hit him, then shot him and fled. Lt. Rosenberg testified that this conduct was done to enhance the reputation of the shooter and the gang. We find that there was substantial evidence supporting the jury's findings.

6. *Appellant Victor's Three-Year Enhancement Is Improper*

Victor contends, and the People concede, that the three-year enhancement pursuant to section 186.22, subdivision (b)(1) of his 38-year-to-life sentence was invalid. We agree. At the time relevant here, that section provided that a defendant sentenced to a life term is ineligible for parole for a period of 15 years but is not subject to the three-year enhancement. The three-year enhancement is therefore ordered stricken and the trial court is ordered to correct the abstract of judgment.

DISPOSITION

Appellant Larry Hernandez's conviction of first degree murder is reversed unless the People accept a reduction of the conviction to second degree murder. If, after the filing of the remittitur in the trial court, the People do not bring Larry Hernandez to retrial within 60 days, the trial court shall proceed as if the remittitur constituted a modification of the judgment to reflect a conviction of second degree murder and shall resentence Larry Hernandez accordingly.

That portion of the judgment imposing a three-year enhancement pursuant to section 186.22, subdivision (b)(1) as to appellant Victor Hernandez is reversed. In all other respects the judgment is affirmed.

NOT TO BE PUBLISHED

WEISBERG, J.*

We concur:

MALLANO, P.J.

ROTHSCHILD, J.

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*Retired Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.